

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Retransmission Consent, Cable Network)	RM-11203
Non-Duplication, and Syndicated)	
Exclusivity)	

**COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments in support of portions of the Petition for Rulemaking filed by the American Cable Association (“ACA”).¹ NCTA is the principal trade association of the cable television industry in the United States, representing owners and operators of cable systems serving 90 percent of the nation’s cable television households as well as more than 200 cable program networks.

In particular, ACA’s Petition highlights how the FCC’s network non-duplication rules, in combination with the statutory retransmission consent rights, can be invoked by local network affiliated stations in a manner that ill-serves the public interest. The Commission should issue a Notice of Proposed Rulemaking to thoroughly reexamine its network non-duplication rules in light of the myriad changes in the video marketplace since their adoption.

Specifically, ACA proposes that the FCC “eliminate broadcast exclusivity when a broadcaster elects retransmission consent and seeks additional consideration for carriage by a small cable company.”² ACA suggests this change so that “when a station chooses to set a

¹ American Cable Association Petition for Rulemaking, filed Mar. 2, 2005 (“ACA Petition”).

² ACA Petition at 2.

‘price’ for retransmission consent, artificial barriers to alternatives for small cable companies are removed.”³

We agree. NCTA has long maintained – including in its recent comments in the FCC’s Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”) Notice of Inquiry – that the network non-duplication rules deserve an overhaul.⁴ The ACA Petition for Rulemaking provides the Commission with an opportunity for this long-overdue fresh look. The exclusivity rules merit a review regardless of whether Congress decides to revisit the broader issue of retransmission consent.

The network non-duplication rules permit a local station to bar a cable operator from providing cable customers with network programming from a more distant station. Local stations under the rule can assert these blackout rights even if the local network station is not carried on the cable system.

The rules were established in an environment wholly different from that faced by local broadcasters or cable operators today. In 1988, during the FCC’s last comprehensive reexamination,⁵ must carry rules had been struck down by the courts. The Commission thought, “in the absence of must carry rules,” a local broadcaster’s ability to assert exclusive rights to programming could be “an important tool in winning cable carriage.”⁶ Moreover, at that time cable operators could “acquire broadcast signals for retransmission regardless of any exclusivity

³ Id. at 3.

⁴ See Comments of the National Cable Television Association, MM Docket No 92-259 (filed Jan. 4, 1993) at 34-36; Petition of the National Cable Television Association for Reconsideration, MM Docket No. 92-259 (filed May 3, 1993) at 20-22; Comments of the National Cable & Telecommunications Association, MB Docket No. 05-28 (filed Mar. 1, 2005).

⁵ Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299 (1988).

⁶ Id. at 5309.

agreements the broadcasters may have purportedly obtained from the producer.”⁷ The Commission found this state of affairs provided “asymmetric treatment of competitors and, more importantly, we see many reasons to think that viewers and the public interest are being poorly served by these arrangements.”⁸ As a result of this perceived asymmetry, the FCC granted local broadcasters new rights to assert exclusivity – even if they were not carried on the cable system.

Times, and the law, have decidedly changed since the FCC last assessed the reasons for these rules. 1992 ushered in must carry and retransmission consent rights for broadcasters.⁹ Unlike 1988, non-duplication rights no longer are necessary as a surrogate for carriage rights. Local broadcasters now can choose the protections of their statutory must carry rights. And unlike 1988, cable operators no longer can freely choose to retransmit local or distant broadcast signals. Instead, local broadcasters that forgo guaranteed mandatory cable carriage can choose to negotiate in the marketplace for retransmission consent, and distant signals can only be carried if the operator gains the distant station’s consent.

The existence of the FCC-conferred blackout rights exacerbates the adverse impact on cable customers of today’s “heads-I-win, tails-you-lose” environment for broadcast signal carriage. As ACA’s petition points out, the blackout rules can increase the price for cable service by preventing a cable operator from providing cable customers with programming from a willing seller in the form of a more distant network station.¹⁰ In the extreme case, it can serve to deprive

⁷ Id. at 5300.

⁸ Id.

⁹ 47 U.S.C. §§ 614, 325.

¹⁰ ACA Petition at 9. (“For small cable companies today, when broadcasters seek a ‘price’ for retransmission consent, broadcasters block access to other sources of network programming precisely to threaten disruption and inconvenience to cable consumers, all to gain leverage to extract a higher retransmission consent price.”)

cable customers of access to all of a network's programming if an operator and the local affiliate cannot agree on the terms for carriage.

Under these circumstances, the public interest is disserved by granting those local broadcasters that opt to forgo mandatory carriage rights the artificial leverage inherent in the FCC's blackout rules. If a local broadcaster desires governmental protections against the workings of the marketplace, it can avail itself of mandatory carriage and the regulatory protections afforded by network non-duplication rights. If the local broadcaster instead wishes to engage in marketplace negotiations regarding carriage, it should not be permitted to rely on FCC rules that distort the workings of that marketplace.

The FCC last looked into this issue more than a decade ago.¹¹ Moreover, Congress in SHVERA directed the FCC to examine the impact on competition in the multichannel video programming distribution market of the current retransmission consent and blackout rules, among other things.¹² The time is ripe for a reform of the network non-duplication rule as applied to retransmission consent stations to correct the distortions it causes to the marketplace.

Respectfully submitted,

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¹¹ Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues, 9 FCC Rcd. 6723, 6746-47 (1994); Report and Order, 8 FCC Rcd. 2965, 3006 (1993).

¹² SHVERA, § 208.

CERTIFICATE OF SERVICE

I, Gretchen M. Lohmann, hereby certify that copies of the **National Cable & Telecommunications Association's Comments** were served via first class mail, postage prepaid, this 18th day of April, 2005, upon the following:

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